

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*orig. Affidavit
of mailing*
77-1224

To be argued by
RICHARD S. BERNE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1224

UNITED STATES OF AMERICA,
Appellee,
—against—

FRANK TILLMAN LEWIS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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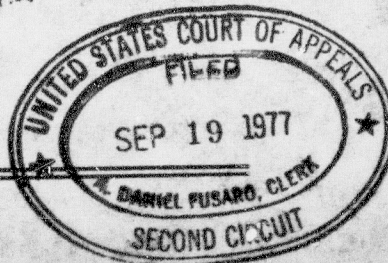


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1224

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK TILLMAN LEWIS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Frank Tillman Lewis appeals from two judgments entered against him in the United States District Court for the Eastern District of New York (Thomas C. Platt, J.). The first judgment was entered on April 29, 1977 and convicted appellant after a jury trial, of armed bank robbery of Barclay's Bank at 2215 Church Avenue in Brooklyn, New York, in violation of 18 U.S.C. §§ 2113 (a) and (d) (Counts Two and Three) and conspiracy to commit the same, in violation of 18 U.S.C. § 371 (Count One). The second judgment found appellant in contempt for refusing to answer certain questions which he was asked at the bank robbery trial of his co-defendant Robinson Quinones.¹ For his bank robbery and con-

¹ At his trial, Quinones was found guilty of armed bank robbery and conspiracy to commit armed bank robbery. Quinones received concurrent sentences of twenty-five and five years imprisonment on the respective counts and is currently serving his sentence. Quinones has appealed his conviction, Docket No. 77-1298; his appeal will be heard by this Court in October, 1977.

spiracy convictions, appellant was given consecutive sentences of twenty-five years and five years, for a total of 30 years imprisonment. For his contempt, appellant was given six months imprisonment, to be served consecutively to his bank robbery sentences. Appellant is currently serving his sentences.

On the appeal of his bank robbery convictions, appellant understandably does not challenge the sufficiency of the evidence against him, but rather alleges that the trial court erred (1) by denying his request for a pre-trial continuance, thereby supposedly depriving him of his right to effective counsel; (2) by failing to instruct the jury pursuant to 18 U.S.C. § 3501(a) on the voluntariness of his confession; (3) by admitting evidence of an allegedly impermissibly suggestive photographic identification and (4) by failing to instruct the jury on the issue of identification. Finally, with respect to his contempt conviction, appellant argues that there was insufficient evidence to support the Court's findings.

Statement of Facts

A. The Bank Robbery Trial

At about 9:15 on the morning of January 3, 1977, appellant and his accomplice, Robinson Quinones, robbed the Barclay's Bank at 2215 Church Avenue, Brooklyn, New York, and escaped with approximately \$11,800. in cash (G. 26-36).²

The evidence against appellant was overwhelming. Norma Sharpe, a customer in the bank on the day of the robbery, identified appellant from a photo display a

² Lettered references are to the transcripts of the proceedings below as arranged and marked by counsel for appellant.

few days after the incident and testified concerning this identification at trial. Richard Casciano, a driver employed by the Parkridge Limousine Service, testified that he drove appellant to and from the vicinity of the bank on the day of the robbery. A gun, which had been seized from the bank guard during the course of the robbery, was found in appellant's room at the time of his arrest. A second gun which had been twice fired in the bank was also found in appellant's room at the time of his arrest. Finally, the appellant admitted his participation in the crime.

The robbers were driven to the bank by chauffeured limousine (G. 64-65). Upon entering the bank, appellant stationed himself in the general area of the front entrance, while Quinones started toward the teller area, both robbers pretending to be regular customers. When the bank security guard, Turner Davis, asked Quinones to move to the back of the customer line, Quinones pulled a mask over his face, placed a gun to the guard's head, and disarmed him (G. 13, 27-28). At this point, appellant immediately drew his gun and ordered everyone to get down and not to move (G. 28, 33-36, 40-42, 51).

Quinones then vaulted over the tellers' counter and proceeded to collect money from the teller cash drawers. When one teller moved slightly, he pointed his gun at her and threatened to kill her (G. 19-20, 52). While Quinones was thus busy collecting the money, appellant remained stationed at the main entrance of the bank standing guard. During this time, an old woman entered the bank and, as she attempted to leave, appellant struck her on the head, threw her to the ground, and warned her not to move or she would be killed. He then returned to the main entrance area and fired two shots from his gun in the vicinity of where he was standing. Fortunately, no one was injured (G. 31, 53).

When Quinones had finished removing money from various tellers' drawers and taking bags of money from the bank employees, he leaped back over the counter and joined appellant near the middle of the bank. The pair then stuffed the bags of cash into a brown container, and Quinones, at appellant's orders, fled the bank, followed shortly thereafter by appellant (G. 32, 54).

Upon leaving the building appellant and Quinones went around the corner and entered the same white Cadillac limousine which had transported them to the bank earlier (G. 55-57, 66-68, 75-78). The car then drove off and eventually dropped off the two robbers in the vicinity of Carroll Street and 8th Avenue in Brooklyn at approximately 9:25 A.M. (G. 66).

Through investigation, the Federal Bureau of Investigation ("F.B.I.") determined that appellant was one of the perpetrators of the Barclay's Bank robbery. On January 15, 1977, after learning that appellant was staying at the New York Hilton on Sixth Avenue in Manhattan, F.B.I. agents and detectives of the New York City Police Department proceeded to the hotel (G. 80-81, 111). After the agents had identified themselves outside appellant's room, he shouted that he was with a girl whom he threatened to kill (G. 18, 111-112). Shortly thereafter, appellant came to the door shielding himself with a woman, and at this point the agents placed him under arrest, and gave him his *Miranda* warnings (G. 81, 112).

The agents immediately searched the room for appellant's accomplice and then, finding it otherwise unoccupied, brought the appellant back inside. In response to their inquiry, appellant indicated that there was a girl under the bed and a gun in his travel case. As a result of this information, the agents recovered under the bed the gun that was taken from the bank security guard

during the robbery. They also recovered from appellant's travel case a gun that had fired a bullet and discharged a cartridge which were recovered in the bank on the day of the robbery (G. 13-15, 82-85, 125-131). In addition, following the receipt of his *Miranda* warnings, appellant stated, during a conversation with the agents, "Yea, I'm guilty. Money is my bag." (G. 112-113).

Appellant neither testified in his own behalf nor called any witnesses.

B. The Contempt

Following his bank robbery conviction, appellant was called to testify as a defense witness at the trial of his accomplice Quinones.³ The sequence of events was as follows.

The Quinones trial commenced on May 2, 1977. At the beginning of the defense case, counsel for Quinones stated for the record that his client wanted to call appellant to testify on his behalf. However, Quinones' lawyer stated that he had strongly recommended against calling appellant and gave as one of his reasons the fact that after five hours of questioning appellant he still did not know what appellant's answers would be (Q. 270).⁴ Appellant's counsel, in turn, stated that he had advised his client "to take the Fifth as to every question". He further stated that he had warned appellant that if he answered some questions and invoked the Fifth Amendment as to others, the Court might not allow him to claim his Fifth Amendment right; and that if he still did not

³ Quinones was apprehended by the F.B.I. on March 31, 1977, two and a half months after appellant.

⁴ Numbers in parentheses preceded by "Q" refer to the transcript of the trial of Quinones.

respond to the questions, then he faced a possible penalty for contempt (Q. 270-272).⁵

In order to determine whether appellant would rely on his Fifth Amendment right against self-incrimination as to every question or merely to selected questions, or even waive it as to every question, Judge Platt wisely decided to hold a voir dire (Q. 272-274).

After appellant was sworn in for the voir dire, he indicated that he would only answer questions if the jury were present, whereupon he was excused to consult with counsel (Q. 275-276).

After appellant resumed the witness stand, and before he was questioned by Quinones' counsel, the court advised him that although his Fifth Amendment rights still protected him, he could not be selective as to which questions he would answer, and he could lose his right to invoke the privilege (Q. 277). Appellant indicated that he did not want to waive his rights, and he was again excused to confer with counsel (Q. 277-278).

After his second conference outside the courtroom, appellant again resumed the stand, where he testified about the events of the morning of January 3, 1977. In essence, he admitted taking a limousine to the vicinity of Barclay's Bank on that morning, but stated that he was with a friend whom he knew only as "Jose" (Q. 280). He further stated that to his knowledge, Quinones did not rob the bank (Q. 286-287). On cross-examination, when asked if he and "Jose" entered Barclay's Bank, appellant responded by stating that the court records "state that myself and another individual went

⁵ Appellant was not present for this discussion, but there is no allegation that his attorney did not, in fact, give him the advice, as represented to the Court.

and robbed Barclay Savings Bank". He further stated that if questioned further about what he did inside the bank, "I will definitely, no question about it, refer you to the record" (Q. 298-300).

At the conclusion of the voir dire, it was agreed that appellant would be allowed to testify. If he refused to answer the proposed questions on cross-examination, however, the court stated that it would hold appellant in contempt (Q. 310).⁶

Appellant then was called to testify and stated, as he had during the voir dire, that he was in the limousine with "Jose" on January 3rd, that Quinones was not in the limousine and that Quinones knew nothing about the robbery (Q. 314-316, 320). Again, on cross-examination, appellant refused to answer "yes" or "no" to the questions "... did you go into Barclay's Bank" (Q. 350-352), and "Did Jose go into the bank with you?" (Q. 361). The court, after directing appellant to answer the questions and warning him on the first occasion that he risked contempt, held appellant in contempt when he continued to answer that he relied on the records of his trial (Q. 353, 361).⁷

⁶ Although appellant was not present when the court made this statement, the court had already made its intentions clear to him in its admonishments, noted above.

⁷ The texts of the court's orders and appellant's responses appear below:

Q. Now, during that time did you go into Barclay's Bank?

A. According to the record I did, according to the records of my trial.

Q. Well, according to you, did you go into the bank?

A. Well, I was solely relying on the Court which found me guilty, you know, which clearly states that I got out of the limousine, I walked down here, I went into the Barclay's Bank, I returned out of Barclay's Bank and

[Footnote continued on following page]

got into the limousine, according to the record I was found guilty, I am quite sure that you accept that as a fact, the Court——

THE COURT: Don't you want to tell the jury?

THE WITNESS: Well, it is recorded, sir.

THE COURT: You are under oath now. She asked a question, did you go into the bank or——

THE WITNESS: According to the record.

THE COURT: No, can't you answer that question yes or no?

THE WITNESS: According to the records I went into the bank and returned to the limousine.

THE COURT: Forgetting about the records, did you or didn't you?

THE WITNESS: The records got me 30 years, you know, the decision and investigations and whatnot got me 30 years, obviously the Court considered, you know, that enough proof and whatnot, and according to, I will state it again, according to the records, according to the jury's return with a guilty verdict they found me guilty, clearly stated that I went into the bank, came out of a limousine and returned to one.

BY MRS. SCHWARTZ:

Q. Mr. Lewis, it is quite clear what twelve people thought, but the question is according to your version of the facts did you or didn't you go into Barclay's Bank on the morning of January 3rd?

A. Again I say according to a court of law it found me guilty indicating that I did go to Barclay's Bank.

MRS. SCHWARTZ: Would your Honor instruct the witness to answer the question yes or no?

THE COURT: Answer the question, Mr. Lewis.

THE WITNESS: I am answering.

THE COURT: Answer the question yes or no, did you or did you not go into Barclay's Bank on the morning of January 3rd?

THE WITNESS: Once again I will state——

THE COURT: Mr. Lewis, I will warn you now unless you give a yes or no answer to that question the Court is going to hold you in contempt.

THE WITNESS: I'm trying to.

THE COURT: Answer the question yes or no.

THE WITNESS: Once again I say the records

[Footnote continued on following page]

ARGUMENT**POINT I**

The court's denial of appellant's request for a continuance did not deprive him of effective representation at trial.

Appellant claims that he was deprived of his right to effective assistance of counsel by the district court's denial of his request for an adjournment of the trial to allow him more time to prepare his case. Specifically, he contends that the court's ruling, by directing him to trial a month and a half after his arrest, prevented him from thoroughly discussing his case with counsel, thereby allegedly depriving him of adequate representation.

found me guilty of returning from the car from the Barclay's Savings Bank.

THE COURT: All right.

The Court holds this witness in contempt of Court for refusing to answer the question.

Go on with the next question. (T. 350-353).

* * *

Q. Did Jose go into the bank with you?

A. According to my previous trial, which indicates that myself and another individual robbed the Barclay's Bank, according to the decision of the jury and so forth.

MRS. SCHWARTZ: Your Honor, I ask that the witness be directed to——

THE COURT: Did Jose go into the bank with you, yes or no?

THE WITNESS: Again, according to the records, according to the trial——

THE COURT: You understand I am going to hold you in contempt unless you answer that question yes or no?

THE WITNESS: I understand fully.

THE COURT: I hold you in contempt a second time. (T. 361).

Appellant was arrested on January 15, 1977 and arraigned upon the original indictment on February 4, 1977 (B. 1, *et seq.*). He was subsequently arraigned on the superseding indictment on which he was tried on February 11, 1977. At the arraignment, counsel for appellant indicated that he had already filed motions on behalf of the appellant (C. 4). On February 18, 1977, the scheduled return date for motions (B.4), the court continued the case to March 2, 1977, the date requested by defense counsel, for suppression hearing and trial (D. 4).

On March 2, 1977, just prior to the scheduled hearing on appellant's motion to suppress, defense counsel informed the court that *appellant* desired a continuance to further discuss the preparation of his defense with counsel (E. 4). Significantly, however, defense counsel did not state that he was unprepared for trial. The court, after allowing appellant to further explain his request, denied the application, stating that the case had been on the calendar for a month and pointing out that since appellant was incarcerated, the court was compelled to provide him with a speedy trial (E. 6). In so ruling, the trial judge stated that the trial date had been requested by defense counsel and that counsel had stated that he would be ready. Judge Platt stated, though, that he would reconsider his ruling during the course of the trial if necessary (E. 5, 6).

The decision to grant or deny a continuance of a trial is a matter within the sound discretion of the trial judge; the sole task of a reviewing court is to determine whether or not the decision was reasonable. *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Maxey*, 498 F.2d 474, 483 (2d Cir. 1974); *United States v. Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States v. Hall*, 448 F.2d 114, 116 (2d Cir. 1971), *cert. denied*, 405 U.S.

935 (1972). In *United States v. Maxey, supra*, in sustaining the trial judge's denial of the defendant's request for a continuance, this Court indicated that among the factors to be considered by the trial judge are not only whether the request is made in good faith, but also, the public interest in a speedy trial of defendants in criminal cases, the period of defendant's incarceration awaiting trial; and the overall nature of his legal representation. *United States v. Maxey, supra*, 498 F.2d at 483. Only after consideration of these factors "can it be determined whether presentation was" 'so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" *Id.* quoting from *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). See also, *United States v. Taylor*, — F.2d —, No. 76-1210, Slip op. 2805, 2829 (2d Cir. April 13, 1977).

Here, the trial court's denial of appellant's request for a continuance was entirely reasonable and a proper exercise of its discretion. In the first place, the request for the postponement was from appellant, not from counsel, who had previously indicated that he was ready for trial and never stated that he was unprepared. Secondly, the court's decision was based on the legitimate concern of the public interest in speedy trials, appellant's pre-trial incarceration, and its concern with avoiding rescheduling other pending matters it had already moved to accommodate the instant case (E. 6). See, *United States v. Carroll, supra*, 510 F.2d 511. Finally, appellant has failed to specify what counsel might have done had he been given more time to prepare. The case involved a straightforward bank robbery where the evidence was overwhelming, and appellant neither called any witnesses nor testified in his own defense. In addition, appellant failed to ask for an adjournment during the course of the trial due to any unexpected develop-

ment even though, as noted above, Judge Platt had specifically stated that he would entertain a request for a continuance if the need arose (E. 6). In sum, the lower court's implicit decision that a month was sufficient time to prepare for the case was entirely reasonable under the circumstances.⁸

Furthermore, whether judged by the standard for inadequacy of counsel enunciated in *United States v. Wight*, *supra*, and followed in this Circuit, or by any other standard, see *Rickenbacker v. Warden, Auburn Correctional Facility*, 550 F.2d 62 (2d Cir. 1976), appellant was adequately represented at trial. Significantly, appellant has failed to specify any examples of ineffectiveness on the part of his counsel, and would be hard pressed to do so. Defense counsel submitted both a written request for discovery and a motion to suppress on appellant's behalf (C. 4, E. 7). In addition, he requested a pre-trial hearing on the motion during which he engaged in extensive cross-examination of the Government's witnesses as well as argument in opposition to the admission of the evidence the Government sought to use at

⁸ The two cases relied on by appellant are clearly distinguishable from the facts in the instant case. In *United States v. Millican*, 414 F.2d 811 (5th Cir. 1969), defense counsel was new at the bar and was appointed to represent the defendant only two days before trial. Moreover, the Fifth Circuit specifically noted that shortness of time for preparation would not ordinarily merit reversal, but rested its decision on defense counsel's specific request for the continuance to interview an alibi witness as well as this inordinately short period of time for preparation. *Supra* at 813-14. In *United States v. Ploeger*, 428 F.2d 1204 (6th Cir. 1970), the trial was scheduled only ten days after indictment and defense counsel was appointed on the day before the trial was scheduled to commence. The court in reversing the defendant's conviction, noted that counsel had not only insufficient time to investigate and prepare for trial, but had not even read the indictment.

trial (E. 3, 13-19, 32-46). At trial, as in the suppression hearing, appellant's counsel vigorously cross-examined the Government's witnesses (G. 9-11, 16-17, 24-25, 59-61, 69-70, 90-107, 114-124). Furthermore, notwithstanding the overwhelming evidence against appellant, his attorney argued forcefully for his acquittal in his closing statement to the jury (H. 17-29). Appellant was well represented at trial. His claim is without merit.

POINT II

The court was not required to charge the jury on the voluntariness of appellant's admission.

Relying on *United States v. Luchetti*, 533 F.2d 28 (2d Cir. 1976), and *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975), appellant contends that Judge Platt failed to properly instruct the jury with respect to the voluntariness of his post-arrest statement to FBI agents on January 15, 1977, as required by 18 U.S.C. § 3501, and therefore committed plain error.⁹

Prior to trial, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Government provided defense counsel with a copy of appellant's statement (E. 3). On the day of trial, just prior to the suppression hearing, appellant's counsel moved to include the admissibility of this statement within the scope of his motion to suppress (E. 3-4). During the course of the hearing on

⁹ Title 18, U.S.C. § 3501(a) states in pertinent part:

If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it proper under all the circumstances.

the motion, two FBI agents testified, *inter alia*, about the arrest of appellant on the morning of January 15, 1977, at the New York Hilton Hotel (E. 1 *et seq.*).

Special Agent Wichner described the circumstances of appellant's arrest and statement, noting that due to information received by the FBI that appellant was armed and had fired a gun during the bank robbery, most of the agents and officers present were equipped with body armor, various weapons and walkie-talkies (E. 12). In response to appellant's counsel's questions on cross-examination, Agent Wichner testified that appellant was advised of his *Miranda* warnings immediately after his arrest and that after being so advised stated, "I am guilty, the money is in my bag," or some words to that effect" (E. 17). The remainder of Wichner's cross-examination was concerned primarily with the recovery of the weapons seized during appellant's arrest (E. 18-19).

Special Agent Farrell also testified about the circumstances surrounding appellant's arrest, including the statement and the recovery of two handguns in the room in which appellant was staying (E. 20-25). In response to appellant's attorney's questions on cross-examination, Farrell stated that he gave appellant his *Miranda* warnings immediately after his arrest and that appellant thereafter made the admission about which Agent Wichner had testified (R. 35-36).¹⁰

Appellant neither testified nor offered any other evidence as to the involuntariness of his statement. Moreover, the thrust of defense counsel's argument on the

¹⁰ Although the record of the suppression hearing indicates that appellant stated that the money was by his bag, and appellant properly states that no money was ever recovered, Agent Booth testified at trial that appellant states "Yeah, I'm guilty. Money is my bag" (G. 113).

motion was whether appellant had in fact made such a statement at all, rather than whether it was voluntary finding (E. 45). After hearing argument, Judge Platt properly denied appellant's motion in all respects (E. 46).

At the trial, although Agent Farrell again testified that appellant was given his *Miranda* warnings immediately after his arrest, he did not testify about appellant's statement (G. 81-82). Special Agent Booth testified that after being advised of his constitutional rights, appellant stated "Yeah I'm guilty. Money is my bag" (G. 112-113). Consistent with the thrust of his argument at the suppression hearing, defense counsel's cross-examination of Agent Booth focused on whether or not the incriminating statement was actually made rather than its voluntariness or lack thereof (G. 123-124). Appellant neither testified nor offered any evidence from which the jury might have inferred that his statement was anything but voluntary. Finally, his counsel's sole contention in his summation to the jury concerning this statement implied that it was not made. Specifically he argued:

"Now, Agent Farrell does not testify as to any statements. Apparently he knows nothing about it, nothing; no statement at all. It's Agent Booth who says there are statements. Agent Farrell absolute silence. Agent Booth says Mr. Lewis made a statement that Mr. Berne has referred to. Use your own intelligence. I don't have to bat down this kind of thinking." (H. 27).

Nowhere in his summation did defense counsel argue that the statement was made involuntarily. Furthermore, defense counsel neither requested nor objected to the lack of a charge on voluntariness.

We respectfully submit that, on the basis of this record, the issue of the voluntariness of appellant's state-

ment was not sufficiently raised to require a charge pursuant to 18 U.S.C. § 3501(a). Dispositive of the issue is the case of *United States v. Diop*, 546 F.2d 484 (2d Cir. 1976). In *Diop*, the defendant moved to suppress his post-arrest statements on the ground that his comprehension of English was so limited that he had not understood his *Miranda* warnings and had not realized he was under arrest. The trial court suppressed the statements on the ground that the Government had failed to establish that Diop had consciously waived his constitutional rights. At trial, the defendant denied making the statements which the Government later introduced in its rebuttal case. On appeal, the defendant, relying on *United States v. Barry, supra*, 518 F.2d 342, argued that he had raised the issue of the voluntariness of his post-arrest statements and that the trial court had erroneously failed to properly instruct the jury pursuant to 18 U.S.C. § 3501(a). This Court rejected the defendant's contention, stating that his various assertions failed to sufficiently raise the issue of voluntariness so as to invoke the required instruction under the statute. *United States v. Diop, supra*, 546 F.2d at 486-87. Moreover, the court specifically noted the defendant's denial of making the statements as a substantial factor in its ruling. 546 F.2d 486-87.

Similarly, in the instant case, although the Government elicited evidence concerning circumstances under which appellant made his post-arrest statement, appellant's primary contention, as demonstrated in his cross-examination and argument during both the suppression hearing and the trial, was that he did not make the statement at all. We submit that as in *Diop, supra*, his reliance on this argument, combined with his failure to testify or offer any evidence of coercion, and his failure to request or object to the lack of a charge on the volun-

tariness of his post-arrest statement, failed to sufficiently raise the issue to invoke the requirements of the statute.¹¹

Even assuming *arguendo*, that it could be said that the statute was applicable in the instant case, the failure to instruct the jury would have been harmless error under *United States v. Lucchetti*, 533 F.2d 28 (2d Cir. 1976). In *Lucchetti*, the defendant moved to suppress his post-arrest statements and grand jury testimony before trial. At a pre-trial hearing he testified that his statements had been psychologically coerced and that he was never shown the "waiver of immunity" form before he testified in the grand jury. 533 F.2d 35. After the motion was denied, the Government offered both the defendant's admissions and portions of his grand jury testimony at trial, but the defendant did not testify or challenge, in any manner, the voluntariness of these statements. *Id* at 35.

Although this Court ruled that § 3501(a) was applicable, it held that under the facts, certainly more compelling than those in the instant case, the failure of the trial court to charge the jury as required by the state was harmless:

"As the government has pointed out, however, Lucchetti offered no evidence at trial from which the jury could have inferred that the confessions were anything but voluntary. Conspicuously absent from the evidence at trial were any of the contentions raised by Lucchetti at the suppression hearing and discussed in Part 1 of this opinion. Even though the trial court failed to apply the statute, the appellant here certainly suffered '[in]

¹¹ Appellant's failure to request the 3501 charge is understandable. His tactic at trial was to contend the admission was never made. Instructions to the jury regarding the voluntariness of the statement would only have served to undermine his defense.

sufficient prejudice', if any, 'to justify vitiating the jury's verdict' [Citations omitted]. The district court's error was indeed harmless." (533 F.2d at 40).

Here appellant clearly failed to raise the issue of voluntariness to the extent it was raised in *Lucchetti*, and therefore, the failure of the trial court to apply the statute was unquestionably harmless error, if error at all.¹²

POINT III

The photographic identification evidence was properly received in evidence.

A. The photographic array shown to Mrs. Norma Sharpe was not impermissibly suggestive and therefore satisfied due process.

Relying on *United States v. Simmons*, 390 U.S. 377 (1968), appellant contends that the composition of the photographic spread shown to Mrs. Sharpe was impermissibly suggestive and, therefore, at the admission into evidence of her identification of him from the spread was plain error. Specifically, appellant argues that the nine other photographs were insufficiently similar to his and that his photograph was the only one which contained a height indicator, thus possibly indicating that it was a police photograph. This argument is frivolous.

¹² The facts in *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975), where the court held that failure to comply with § 3501(a) was error, are clearly distinguishable from the instant case. In that case unlike here, the defendant testified at trial that his statements were the product of physical threats, thus placing squarely before the jury the circumstances under which his statements had been given.

The photographic spread which was shown to Mrs. Sharpe is reproduced in the government's appendix. An examination reveals that the spread is totally fair and in no way impermissibly suggestive. It contains ten photographs of black males, all facing front, all of the same view, and all wearing eyeglasses.¹³ Appellant is the third individual from the left on the bottom row. As this Court recently indicated in *United States v. Bubar*, — F.2d —, No. 76-1140, Slip op. 4519 (2d Cir. June 30, 1977), "[t]he due process clause does not require law enforcement officers to scour about for a selection of photographs so similar in the subject matter and composition as to make subconscious influences on witnesses an objective impossibility." *Id.* at 4529. See also, *United States v. Boston*, 508 F.2d 1171 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Harrington*, 492 F.2d 487, 494-5 (2d Cir. 1973). The photographic spread used here was both fair and non-suggestive.

B. Agent Farrell's testimony with respect to the photographic identification was properly received in evidence.

Mrs. Norma Sharpe, a customer in the bank at the time of the robbery, testified concerning her observations of the bank robbery. When asked if she could identify anyone in the courtroom as one of the perpetrators of the crime, she mistakenly pointed out a Deputy United States Marshall. Thereafter Mrs. Sharpe testified that following the bank robbery, she had been shown the photographic display reproduced in the Government's appendix and that she had picked out photograph number 7 of (Government Exhibit 7G) as that of one of the

¹³ It should be noted that Agent Farrell took particular precautions in preparing this photographic spread so as to insure its fairness. (E. 25-27, G. 39).

men she had seen during the bank robbery (G. 33-36).¹⁴ Following her testimony, the government called Agent Farrell who testified, *inter alia*, that he had shown this photographic spread to Mrs. Sharpe on two occasions, and that the photograph she had picked out on both occasions was that of appellant (G. 37-43).

On the basis of this sequence of events, appellant seeks to raise the argument that the admission of Agent Farrell's testimony was plain error. Specifically, he argues that Agent Farrell's testimony should have been excluded as hearsay under Rule 801(d)(1)(C) of the Federal Rules of Evidence. We disagree.

Agent Farrell's testimony was properly admitted in accordance with Rule 801(d)(1)(c), which provides in pertinent part:

"(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him;"

In his commentary, Judge Weinstein specifically concludes that this rule should apply to permit the admission of statements concerning prior photographic identification as well as prior corporeal identification. Weinstein's *Evidence*, Volume IV, § 801(d)(1)(C) [01] at p. 107-8. Similarly, in his discussion of whether Rule 801(d)(1)(C) operates to allow the testimony of persons present at the out-of-court identification he states:

¹⁴ Although defense counsel objected to the presentation of the photographs to Mrs. Sharpe, he did not object to either her testimony concerning her prior identification or the admission of the photographs into evidence (G. 34).

" . . . If the purpose of the testimony [of the observer] is merely to bolster the eyewitness credibility, no hearsay problem is presented. The statement of the observer or recipient of the fact of identification is being offered not to show the truth of the statement but to show that a statement of identification was made. . . ." *Id.* at 108.

Judge Weinstein goes on to state that serious questions concerning the adequacy of cross-examination and right to confrontation do arise when, unlike here, the eyewitness does not remember or denies that he or she made the identification. *Id.* at p. 108-110.

Here, Agent Farrell's testimony, because it merely demonstrated that Mrs. Sharpe had in fact made a prior identification and that the person in the picture she had picked out was appellant, clearly fitted within Rule 801. Moreover, this same procedure has been sanctioned by this Court in numerous decisions. See, *United States v. Forzano*, 190 F.2d 687, 689 (2d Cir. 1951); *United States v. Miller*, 381 F.2d 529, 537-38 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968); *United States v. DeSena*, 490 F.2d 692, 695 (2d Cir. 1973). See also, *United States v. Ruth*, 461 F.2d 1213, 1214 (D.C. Cir. 1972); *United States v. Anderson*, 406 F.2d 719, 720 (4th Cir. 1969), *cert. denied*, 395 U.S. 967 (1969).

Moreover, since appellant did not object to his testimony when it was offered, he cannot now complain on appeal. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

POINT IV

The court properly charged the jury on the issue of identification.

Finally, appellant contends that the trial court's failure to charge the jury on the dangers of misidentification constituted plain error. This claim is meritless.

At the conclusion of the evidence, defense counsel inquired as to the trial court's charge on identification. Judge Platt stated that he intended to charge the jury on the misidentification issue in the case, and also that he would consider any additional specific charge submitted by defense counsel. However, counsel failed to submit such a request (G. 139). Moreover, appellant's counsel failed to object to the charge as given (I. 40).¹⁵

It is well-settled law that where there has been a failure to request a particular charge, or to object to a charge as given, the court's instructions will only constitute grounds for reversal if they amount to plain error. *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Rosenthal*, 470 F.2d 837, 843-44 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972). Here, as noted above, Judge Platt indicated that he would charge the jury

¹⁵ Judge Platt instructed the jury as follows:

"Now, defendant claims the government has failed to prove beyond a reasonable doubt that he was one of the perpetrators of the crime. The evidence in this case raises the question of whether or not the defendant was in fact the criminal actor or was the criminal actor; unless it necessitates your resolving any conflict or testimony on that issue the burden of proof is on the prosecution with reference to every element of the crime charged, and this burden includes beyond a reasonable doubt, the identity of the defendant as one of the perpetrators of the crime charged" (I. 30).

with respect to the identification issue in the case and invited defense counsel to submit a specific identification charge for his consideration. None was forthcoming. Moreover, it can hardly be argued that the failure to so charge was plain error. The trial court's general charge clearly focused on the issue of appellant's identification as a participant in the crime (I. 30). Furthermore, when Judge Platt's charge is viewed in its entirety, as it must be, *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973) it is immediately clear that the jury was thoroughly and properly charged on the burden the government is required to meet in a criminal case, as well as on the important general issue of the credibility of witness (I. 6-8, 32-34).

Finally, this Court has refused to find reversible error even where the defendant had *requested* a specific charge on the dangers of eyewitness identification, and the trial court merely charged the jury on the general issue of credibility. *United States v. Evans*, 484 F.2d 1178, 1187-88 (2d Cir. 1973). See also, *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir. 1976), *cert. denied*, 426 U.S. 936 (1976). We need only note here, as pointed out above, that appellant's counsel failed to request such a charge and the trial court's careful and accurate instructions to the jury included a specific charge on the eyewitness identification issue in the case. Under these circumstances, it was not error for the trial court to fail to give an additional charge regarding this issue.¹⁶

¹⁶ Appellant's reliance on *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972) is misplaced. Although, the defendant's conviction in *Fernandez* was reversed, this Court clearly stated that the trial court's unwarranted denial of defense counsel's request to be allowed to object to its refusal to give the *requested* identification charge outside the presence of the jury "[tipped] the scale for reversing this judgment . . .". *Id.* at 644. Clearly no such circumstance occurred in the instant case.

POINT V

The finding of contempt was proper, and appellant's contempt conviction should be affirmed.

Appellant contends that his contempt conviction should be vacated and the charge dismissed because the record does not prove beyond a reasonable doubt that he wilfully and intentionally disobeyed a clear, specific, unequivocal order of the court. Briefly, he argues that since he had a Fifth Amendment right to not answer the questions, the court improperly directed him to answer, and that since the prosecution and court knew in advance that he would refuse to incriminate himself, there could be no contempt. Appellant thereby seems to blame the court and prosecutor for allowing him to be put into a position of facing a contempt citation.¹⁷ However, the record fails to support these contentions.

In reviewing a contempt conviction, the record must be viewed in the light most favorable to the government, *United States v. Partin*, 524 F.2d 992 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), to determine whether the evidence shows beyond a reasonable doubt, *Gompers*

¹⁷ Appellant does not claim that the questions propounded to him were unreasonable or improper. Neither does he claim that he did not understand the court's directions to answer the questions, nor that the court's orders were unclear or equivocal.

Moreover, in deciding whether or not to allow appellant to testify, the court had to balance the interest of the defendant on trial, Quinones, who alleged that appellant would exonerate him of the bank robbery charge, against the possibility that appellant, whose fate vis-a-vis contempt was in his own hands, would continue to refuse to answer certain questions. There was always the possibility that appellant, once in front of a jury, would abandon his semantic games. The Government submits that the court properly resolved this dilemma by deciding that the prejudice that would have occurred to Quinones by excluding Lewis's testimony was the primary consideration.

v. *Buck Stove & Range Co.*, 221 U.S. 418, 444 (1911); *United States v. Barnette*, 546 F.2d 187 (5th Cir. 1977), that the defendant wilfully, contumaciously, and intentionally disobeyed a clear unequivocal order of the Court. *Richmond Black Officers v. City of Richmond, Virginia*, 548 F.2d 123 (4th Cir. 1977).

In the instant case, appellant came to the witness stand fully apprised of the possible consequences of his failure to directly respond to questions on cross-examination. He had been warned, prior to trial, by his own attorney that he could be deemed to have waived his Fifth Amendment rights if he testified and that he could be held in contempt if he responded to certain questions but refused to answer others (Q. 271). Indeed, he had been advised by counsel to "take the Fifth as to each question" (Q. 270). However, he ignored his counsel's advice and appeared eager to testify on behalf of Quinones, stating, "they definitely have the wrong man and I would like to present it to a jury" (Q. 276). The court also warned him that he could not selectively answer questions (Q. 277-278). Moreover, after the voir dire, but before allowing appellant to testify before the jury, Judge Platt directed appellant to answer the question "whether or not he committed the robbery of Barclay's Bank on January 3". After conferring with counsel, appellant again refused to answer the question directly, and the court attempted to ascertain whether he was "fearful that any answer, yes or no, might tend to incriminate him?" (Q. 307-309). Despite this invitation by the court to invoke the Fifth, appellant did not respond, and his counsel merely stated, "Sir, he is well aware there is an appeal in this case, which is part of the response" (Q. 310).

Thus, appellant had been made fully aware, before testifying, of his Fifth Amendment right to not incriminate himself. Moreover, he was not reluctant to invoke that right when he was questioned about the

attempted murder of a New York State grand jury witness (Q. 337). Additionally, on three occasions, when ordered to answer questions directly, rather than by relying on the record of his own trial, appellant did so.¹⁸ Nevertheless he refused to say whether or not he

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* * *

Q. Now, Mr. Lewis, at the time you were arrested agents found two guns in your room, is that correct?

A. So they say.

Q. Is that correct?

A. According to the records it is correct.

Q. Now, Mr. Lewis, again I will ask——

A. Let me answer that a better way then. The record will show I have never claimed possession of any weapon. The record will show that they claim that they took one pistol from underneath a bed, one out of an attache case which I voluntarily gave them the combination lock.

I deny that. (Q. 357).

* * *

Q. Another gun was found there, do you recall that?

A. Yes, I do recall that was part of the testimony.

Q. Is it true?

A. According to my trial they considered——

THE COURT: Forget that. Were his statements to that effect true or not?

THE WITNESS: Were the statements concerning——

THE COURT: The possession of the gun, was it true or not true?

THE WITNESS: Not true. (T. 358-359).

* * *

Q. Do you recall the testimony of Vincent Browne?

A. Was Mr. Browne the officer who testified at my trial?

Q. That is correct.

A. Yes, I recall.

Q. Do you recall he testified that he followed you out of the bank and saw you get into the limousine, or a person fitting your description, and wearing a specific coat?

A. Yes, I recall him making that testimony.

Q. Was that testimony truthful?

A. According to the outcome of my trial.

Isn't the Government satisfied that another—another decision by this particular Court——

[Footnote continued on following page]

had gone into the bank and whether or not "Jose" had accompanied him.¹⁹ And on numerous other occasions, appellant answered directly questions which would tend to incriminate him. Clearly, appellant was trying to manipulate the proceedings, answering only those questions it suited him to answer.

In sum, the record demonstrates that appellant knew that he could invoke his Fifth Amendment right, yet when directed to answer two questions, he neither invoked his right nor answered the questions.²⁰ Clearly, appellant knowingly, intelligently, and voluntarily waived his Fifth Amendment right. Since appellant did not rely on that right in refusing to answer the questions, the court was justified in holding him in contempt.

Moreover, a witness cannot pick and choose, as appellant did here, which questions he will answer, *Yates v. United States*, 355 U.S. 66, 73 (1957). Once a witness testifies voluntarily, or under compulsion to testify gives evidence which is tantamount to an admission of guilt or "furnishes clear proof of crime," he will have waived his Fifth Amendment right against self-incrimination.

THE COURT: Your position is not to ask questions.

THE WITNESS: It's all facts.

THE COURT: You are here to answer questions. Just answer the question.

THE WITNESS [Should properly read "The Court"]:
Continue, please.

Q. Did you get into the limousine at the corner of Flatbush and Church?

A. I did get into the limousine at Flatbush. I don't know if it was Church or Linden Boulevard. (T. 361-362).

¹⁹ See Footnote 7, page 7, *supra*.

²⁰ Appellant simply relied on the records of the court. Since he had not testified in his own trial, his reliance on the record was an insufficient answer as a matter of fact and as a matter of law.

Brown v. United States, 356 U.S. 148, 154-156 (1958).²¹ By neither answering the question nor invoking his Fifth Amendment right, appellant was trying to have the best of both worlds. He was trying to exonerate Quinones without either denying or admitting his own guilt; the jury could not therefore fully judge appellant's knowledge of the facts, his credibility and motive to testify. The court therefore was justified in directing the witness to answer. The jury was entitled to hear appellant's response to what the court termed "the key question" of whether or not he had gone into the bank.

Although appellant rests his argument on the assertions that he could have invoked the Fifth Amendment, which the court would have recognized, and the court would not have forced him to answer the prosecutor's questions, the plain fact is that he did not do so. The record reflects that appellant's failure to do so did not stem from a lack of knowledge of his rights but from a deliberate defiance of the court's authority and a desire to disrupt the proceedings.

By not relying on a constitutional right, a right which the court was willing to recognize even though it had been waived, by refusing to respond with a factual answer, and by not even explaining on what ground he refused to answer, appellant clearly showed his contempt for the court, and the court's findings to that effect were justified. *United States v. Martin*, 525 F.2d 703, 708, 710 (2d Cir. 1975), *cert. denied*, 423 U.S. 1035 (1975).

²¹ It is clear that appellant appeared voluntarily. No subpoena was served upon him, and he told the court that he wanted to tell the truth about Quinones (Q. 276, 320, 325). Moreover, his admission that he took the limousine to the vicinity of the bank (Q. 320) along with his statement that he never told Quinones about the bank robbery (Q. 316) amount to admissions of guilt. Similarly, his statement that it was his fault that Quinones was on trial (Q. 333) are probative of both his desire to testify and his guilt.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
September 15, 1977

Respectfully submitted,

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APPENDIX





AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of Sept. 19 77 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Henry Boitel, Esq.

233 Broadway

New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East,
~~Brooklyn District~~ Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

19th day of Sept. 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4546824
Qualified in Kings County
Commission Expires March 30, 1979

